Law-Den Nursing Home, Inc. *and* SEIU Healthcare Michigan. Case 07–CA–108905

August 8, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON AND SCHIFFER

On December 19, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

"4. Since on or about March 18, April 3, and June 10, 2013, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to provide information as requested by the Union, which information is relevant to, and necessary for the effective performance of its role as the collective bargaining representative of the employees described above."

ORDER

The National Labor Relations Board orders that the Respondent, Law-Den Nursing Home, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union on March 18, April 3, and June 10, 2013.

(b) Within 14 days after service by the Region, post at its Detroit, Michigan facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 18, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 8, 2014

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to furnish the Union with requested information relevant to and necessary for the performance of its functions as collective-bargaining representative of the Respondent's unit employees. The General Counsel excepts to certain inadvertent errors in the judge's recommended Order.

[2] We shall amend the judge's conclusions of law to conform to his unfair labor practice findings on the dates alleged in the complaint, and modify the recommended Order to conform to the amended conclusions of law and to the Board's standard remedial language, and in accordance with our decisions in *Excel Container, Inc.*, 325 NLRB 17 (1997), and *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 18, April 3, and June 10, 2013.

LAW-DEN NURSING HOME, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-108905 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Jennifer Brazeal, Esq., for the General Counsel.
C. Todd Inniss, Esq. (Inniss Law Office), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 13, 2013, in Detroit, Michigan. The complaint, which issued on September 19, 2013,[1] and was based upon an unfair labor practice charge that was filed on July 9 by SEIU Healthcare Michigan, herein called the Union, alleges that Law-Den Nursing Home, Inc., herein called the Respondent, violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information that the Union had requested, which information was relevant to the Union as the bargaining representative of certain of its employees.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The complaint alleges, and the Respondent admits, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

The Union represents the following unit of employees employed by the Respondent:

> All full-time and regular part-time housekeeping employees, laundry employees, dietary employees, and certified nursing assistants (CNAs) employed at the Employer's facility in Detroit, Michigan, but excluding the Director of Nursing, the Administrator, all Registered Nurses, Unit Managers, clerical and administrative employees, supervisors and all other employees.

The most recent collective-bargaining agreement between the parties, which is effective from January 1, 2012 through December 31, 2014, at article XIII, states:

> On or about January 13, 2013, Law-Den will meet with representatives to inform them of the current financial condition. If the financial condition of Law-Den has improved to the extent that Law-Den anticipates an ability to reopen wage negotiations; [sic] the parties shall reconvene to consider a wage renegotiation on or after June 15, 2013. No party shall be obligated to change wages but in good faith shall consider any

[1] Unless stated otherwise, all dates referred to herein relate to the year 2013.

> proposal. Law-Den shall not be required to engage in further negotiations unless the economic conditions have improved.

On December 19, 2012, Serena Everett, who is employed by the Union as an organizer, wrote to the Respondent, quoting article XIII of the agreement, and concluding, "Please contact me at your earliest convenience via email or fax to schedule a date and time to meet." On January 7, Everett sent another email to the Respondent stating: "This is my second request to set up a meeting to go over the financial records to see if the financial condition of Law-Den has improved to the extent that Law-Den anticipates an ability to reopen wage negotiations. . . . Please contact me at your earliest convenience via email or fax to schedule a date and time to meet." On January 23, C. Todd Inniss, counsel for the Respondent, wrote to Everett, inter alia:

> Please accept this letter as notification pursuant to the Collective Bargaining Agreement ("CBA") Article XIII, with my apologies for its lateness. At this time Law-Den Nursing Home's ("Law-Den") Financial condition has not improved to allow for any renewed wage negotiation. In addition to the continued financial difficulties discussed previously, you may be aware that Law-Den is required to install a whole building sprinkler system by August 2013. The cost of this system is approximately $100,000 and the funds for same are not readily available. Law-Den is currently exploring solutions to comply with the federal mandate. This is of course our most paramount concern which if not solved, could force Law-Den to cease operations. Consequently, Law-Den is unable to entertain any wage considerations. Per the language and intent of the CBA, I trust this notification is satisfactory and obviate your request for a meeting.

On March 18, Everett wrote to Inniss, stating, inter alia:

> The Contract clearly states in Article XIII . . . that Law-Den will meet with the representatives to inform them of the current financial condition. I would like to schedule another date to meet so we can look over the current financial condition to consider a wage re-negotiation on or after June 15, 2013.

The parties met at the Respondent's facility on April 3. Everett, another union employee and two stewards were present for the Union; Inniss was present for the Respondent. At the meeting, Everett told Inniss that the Union wanted to examine the documents stating that the Respondent had a financial loss, and as he claimed that the Respondent was obligated to install a sprinkler system at a cost of $100,000, she asked to see the documents establishing that they were required to install a sprinkler system and the cost of installation of the system. Inniss replied that he was not going to show her these documents. That was the extent of the meeting.

By email dated May 15 to Inniss, Everett asked to schedule a date for a wage reopener pursuant to article XIII of the contract. Receiving no response to this email, she sent Inniss another email, this one dated June 10, stating, inter alia: "Although we had a meeting discussing your financial status, you still fell [sic] to present the documents proving your financial status. Therefore I'm requesting (2nd request) to schedule a date for the Wage Reopener for Law-Den Union members per the contract language Article XIII." She received no reply to this email and never received the documents that she requested. She testified that she requested this information because under the terms set forth in article XIII, the Respondent's financial conditions determines whether the Union is entitled to a wage reopener, and, in addition, if the Respondent had to install a sprinkler system at the facility, as Inniss alleged, that would have an effect on the Respondent's financial condition.

III. ANALYSIS

The sole allegations herein are that since about March 18 (the date of Everett's third letter), April 3 (the meeting with Inniss), and June 10 (the final email from Everett to Inniss), the Respondent has failed to furnish the Union with the information that it requested, which information was relevant to the Union as the representative of certain of Respondent's employees, in violation of Section 8(a)(5) and (1) of the Act.

The clear and uncontradicted testimony establishes that Everett sent her second letter to Respondent to schedule a meeting and to examine the Respondent's financial records to determine whether its financial condition had improved to the extent that there could be a wage reopener pursuant to article XIII of the contract. Inniss responded that Respondent's financial condition had not improved to allow a wage renegotiation, and, further, that the Respondent was required to install a sprinkler system at its facility that was estimated to cost approximately $100,000 which funds ". . . are not readily available." The letter concludes by saying that if the Respondent is unable to fund this work, it ". . . could force Law-Den to cease operations. Consequently, Law-Den is unable to entertain any wage considerations."

The law is clear that an employer is obligated under Section 8(a)(5) and (1) of the Act to furnish a union that represents his employees with information relevant to the union in performing its collective-bargaining responsibilities. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). This includes information relevant to the union in administering the existing collective-bargaining agreement as well as information that is relevant to it in formulating proposals for a new collective-bargaining agreement. It is well established that an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980); *Bohemia, Inc.*, 272 NLRB 1128 (1984). In *KLB Industries, Inc.*, 357 NLRB No. 8, slip op. at 2 (2011), the Board stated: ". . . an employer's duty to bargain includes a duty to provide information that would enable the bargaining representative to assess the validity of claims the employer has made in contract negotiations." In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956), the Supreme Court stated that ". . . good faith bargaining necessarily requires that claims made by either bargainer should be honest claims," and if such a claim is "important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."

Article XIII of the contract provides that on about January

13, the Respondent will inform the Union if the financial condition of the company has improved to the extent that it anticipates an ability to reopen wage negotiations. In his January 23 letter to Everett, Inniss wrote that Respondent's financial condition had not improved to allow for any renewed wage negotiations and, further, that Respondent was required to install a building sprinkler system at its facility costing approximately $100,000 and that the funds for it "are not readily available." This is precisely what *Detroit Edison*, *Truitt*, and *KLB Industries* were referring to; when an employer makes an unsubstantiated claim, the union, on proper request, is entitled proof of that claim in order to properly evaluate what its bargaining position should be. *S-B Mfg. Co.*, 270 NLRB 485, 492 (1984); *Coupled Products, LLC*, 359 NLRB No. 152 (2013). As this information was clearly relevant to the Union in determining what Respondent's financial condition was, and whether it would be able to reopen wage negotiations, and as Inniss refused to provide any of this information to the Union, Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time housekeeping employees, laundry employees, dietary employees, and certified nursing assistants (CNAs) employed at the Employer's facility in Detroit, Michigan, but excluding the Director of Nursing, the Administrator, all Registered Nurses, Unit Managers, clerical and administrative employees, supervisors and all other employees.

4. Since on or about March 18 and June 10, 2013, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to provide information as requested by the Union, which information is relevant to, and necessary for the effective performance of its role as the collective-bargaining representative of the employees described above.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act, in this case to furnish the Union with the economic information that Everett requested from the Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Law-Den Nursing Home, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time housekeeping employees, laundry employees, dietary employees, and certified nursing assistants (CNAs) employed at the Employer's facility in Detroit, Michigan, but excluding the Director of Nursing, the Administrator, all Registered Nurses, Unit Managers, clerical and administrative employees, supervisors and all other employees.

(b) Refusing to furnish the Union with information relevant to, and necessary for, the effective performance of its role as collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the economic information that it requested on January 7, March 18, and May 15, 2013, but never received.

(b) Within 14 days after service by the Region, post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 19, 2013

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to furnish the Union with information relevant to, and necessary for, the effective performance of its role as collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL provide the Union with the economic information that it requested on January 7, March 18, and May 15, 2013, but never received.

LAW-DEN NURSING HOME, INC.